ARBITRATION ADVISORY

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IDENTIFICATION OF "INDIVIDUAL RESPONSIBLE ATTORNEY" IN FEE ARBITRATION AWARDS

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Business & Professions Code § 6203(d) was amended effective January 1, 1994 to provide that all fee arbitration awards requiring the attorney to refund fees, costs or both, which have become final, may be enforced against the attorney who fails to comply with the award by placing the attorney on temporary inactive status until he or she complies with the award.

In most cases which are arbitrated, one individual attorney will have provided the services for which a refund may be ordered and there will be no confusion as to who will be subject to the interim suspension in the event of non-payment. In the case where a law firm provides the services, however, it will be necessary for the arbitrator or panel to determine and specify each attorney who is to be responsible for satisfaction of the award and who may be subject to the enforcement procedures under Section 6302(d) in the event that it is not paid.

There is little guidance in the legislative history of the new law concerning the criteria for identifying the "responsible individual attorney" in a case where a law firm has provided the legal services in question. We anticipate that the designation will vary from case to case depending upon the facts specific to each case.

The following factors thus are suggested for consideration by the arbitrator or panel in designating the individual responsible attorney or attorneys to be specified in the award:

- Which attorney or attorneys at the firm actually performed the services on the matter in question or directly caused the refund to be due?

- Which attorney or attorneys originated the business or otherwise may have been compensated for bringing the business to the firm?

- Which attorney or attorneys were responsible within the firm for supervising the discharge of the firm's duties to the client on the particular case or matter in question?

- Is it appropriate to name the managing partner or shareholder or senior partners or shareholders of the firm as responsible individual attorneys for enforcement purposes because they may have the exclusive or the greatest power over financial and billing matters for the firm?

- How was the fee which is to be refunded divided under the law firm's compensation system?

- As to associate personnel, to what extent were they supervised or directed by partners or shareholders, and to what extent were they acting independently?

- In cases where a respondent firm may have dissolved, how did the firm apportion the assets of the firm at the time the firm ceased operations?

- Who, and on what basis, has the firm chosen to designate as the individual responsible attorney or attorneys?

- Has the attorney to be designated as the individual responsible attorney received notice of the proceeding and been given a fair opportunity to address the claim for refund?

- Who signed the fee agreement on behalf of the firm?

- Who is the attorney responsible for reviewing the billing?

These factors are not set forth in any mandatory order of precedence; it is anticipated that their applicability and relative importance will vary from case to case.

Finally, where it otherwise becomes difficult to determine the individual responsible attorney, the arbitrator or panel may simply have to designate all attorneys who worked on the matter, jointly and severally, as "responsible individual attorneys" such that each would be induced to make sure that the award is paid and seek contribution from any others responsible afterwards.

The question of when an attorney may be held responsible for conduct toward a client generally has been the subject of case authority which may be helpful in deciding the issue of individual responsible attorney, including Bernstein v. State Bar, (1990) 50 Cal.3d 221 [266 Cal.Rptr. 625, 786 P.2d 352]. In Bernstein, a member, the recipient of recommended discipline from the Review Department, objected to the discipline contending that the client had not paid the full agreed retainer and the member had never filed the substitution of attorney form to become counsel of record before the member's services were terminated, and the written fee agreement under which the work was to be performed for the client had been between the client

and a professional corporation of which the member was a shareholder and not between the client and the member individually. The Supreme Court found the recommended discipline appropriate because, among other reasons, the member had led the client to believe that the member would handle the litigation and thus the mere fact that the retainer had not been fully paid and the substitution had not been filed before the client discharged the member did not preclude the finding of an attorney-client relationship sufficient to support the recommended discipline. Also, the Supreme Court held that the retainer agreement with the professional corporation would not provide a veil to cloak the member's professional lapses because the clients had dealt directly with the member and reasonably expected the member to perform the services for which they had paid or agreed to pay.

Additional authorities addressing related issues include:

Waggoner v. Snow, Becker, et al, (9th Cir. 1993) 991 F.2d 1501, 1505.

Hecht v. Superior Court, (1987) 192 Cal.App.3d 560 [237 Cal.Rptr. 528]

Beery v. State Bar, (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121, 739 P.2d 1289]